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IN THE

Supreme Court of the United States

APRIL TERM, 1962

No. 856

WILLEMS INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, a New York corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above case on November 1, 1961, which dismissed its petition. Respondent's motion for reargument was denied on January 12, 1961 and plaintiff's motion for rehearing was denied on February 2, 1962.

Opinions Below

The opinion of the Court below is officially reported in 295 Fed. 2d 822. It is appended to this petition in appendix.

Jurisdiction

The decision of the United States Court of Claims was made and entered on November 1, 1961. By order made and entered January 12, 1962, the defendant's motion for rehearing, amendment of judgment or new trial was denied. By order made and entered February 2, 1962 the order of January 12, 1962 was amended so as to provide that both defendant's and plaintiff's motions for such relief were denied. Jurisdiction of this Court is invoked under 28 U.S.C. 1255.

Questions Presented for Review

In an action brought by plaintiff-petitioner, as contractor, against the defendant-respondent, under 28 U.S.C. 1491, subd. 4, for breach of two contracts, one being a purchase contract under which plaintiff was to supply the Government with columbite ores mined and exported from British Guiana, and the second being a financial aid contract, the Government counterclaimed against the plaintiff for breach of the purchase contract. The United States Court of Claims dismissed the petition and counterclaim. The following questions are presented:

1. Is the Government liable to its contractor in damages for breach of contract, being a contract made by the Emergency Procurement Service (EPS) as an organ of the General Services Administration (GSA), based upon the contractor's offer which was in two parts, one part offering to supply the Government with whatever the contractor's production of columbite ores in British Guiana would allow up to 2,000,000 or more pounds; the second and alternative part offering 2,400,000 pounds of said ores on a fixed delivery schedule, conditioned upon the Government's "assurance" of and financial "help" in obtaining sufficient mechanized equipment to accomplish such fixed delivery schedule, which the Government accepted with knowledge that the contractor was a small company which

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could not meet such fixed delivery schedule without such financial aid, and the Government thereafter refused or failed to grant such financial aid and thereafter cancelled such contract for alleged nonperformance by the contractor. tractor.

2. Is the Government liable in damages herein for breach of either of two contracts, when the Defense Materials Procurement Agency (DMPA), so authorized by its administrator, refused to execute a (financial aid) contract it drafted, after offer and acceptance "in principle", followed by part performance of the same, unless the contractor agreed to its several demands that the contractor cancel a prior (purchase) contract which Emergency Procurement Service (EPS) executed, both being organs of and responsible to the General Services Administration (GSA), headed by one and the same administrator, Jess Larson, at all the times of the demanded cancellation.

3. Is the Government liable for breach of a (purchase) contract when it refused or failed to renew or extend, upon the contractor's demand, a letter of credit, which the Government was required, as a condition precedent, to and did establish in the contractor's favor upon notice of designation of a bank by the contractor, "to be maintained (by the Government) up to the time the final shipment under the contract is made", but which had expired, and although the Government subsequently agreed to renew, the refusal or failure to renew followed the contractor's refusal to cancel such contract, demanded by the Government, whose administrator thereafter cancelled such contract for alleged nonperformance by the contractor.

Statutes and Executive Orders

The case involves the following Statutes and Executive Orders: Defense Production Act of 1950 (64 Stat. 798); Strategic and Critical Materials Stockpiling Act (50 U.S.C. 98); Executive Order No. 10281 (16 F. R. 8789); and Executive Order No. 10161 (15 F. R. 6105), the pertinent text of which are set forth the Appendix.

Statement

Plaintiff's suit, under the Tucker Act, 28 U.S.C. 1491, is founded upon express and implied contracts with the United States, made and existing on or about and between April 13, 1951 and April 15, 1952, when they were breached by the United States. The basic facts which are not disputed are as follows:

Columbium and tantalum are metals, processed from the placer mining operation of columbite and tantalite ores. In or about 1951, the principal use for columbium was as a carbide stabilizer in stainless steels and for imparting superior creep resistance and fatigue strength to alloys employed in jet engine and gas turbine construction. Tantalum, which has the properties of corrosion resistance that are almost the same as glass, was extensively used in surgical repairs, and tantalum compounds were used as catalysts in optical glass components.

In and about 1951, the domestic mining of columbite was practically nil, no data were available on the stocks of columbium and tantalum in any form, and imports, previously principally from Nigeria, had declined to the lowest point since 1941.

In and about 1951, the Government held confidential geological reports estimating the presence of vast quantities of columbite in British Guiana on lands that were heavily forested and transportation was unavailable. The ores were strategic and critical materials sought for Government stockpile.

Plaintiff held lands in British Guiana under mining concession, exclusive permission or claim, and, on or about March 13, 1951, offered to supply the Government with whatever its production would allow up to 2,000,000 or more pounds of columbite. Plaintiff stated its inability to furnish a fixed delivery schedule and expressed the hope

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to achieve large scale production by obtaining mechanized equipment.

On or about March 29, 1951, the plaintiff made a revised offer to supply the Government with columbite ores. This revised offer was in the alternative, one part again stating plaintiff's inability to furnish a fixed delivery schedule and offering to supply to the Government "whatever our production will allow up to 2,000,000 or more pounds"; the second part offering a fixed quantity of 2,400,000 pounds of columbite on a fixed delivery schedule. The second part was conditioned upon Government "assurance" of and financial "help" in obtaining mechanized equipment upon the lands held by the plaintiff in British Guiana sufficient to accomplish the stepped up production of the fixed delivery schedule. The price of the ores included the cost of the mechanized equipment, but it had to be bought and it had to be delivered.

By telegram, dated April 13, 1951, the United States, acting by the Emergency Procurement Service (EPS) of the General Services Administration (GSA) accepted plaintiff's offer to supply columbite from British Guiana for shipment in the amount of 2,400,000 pounds on the fixed delivery schedule. The State Department, on or about May 28, 1951, notified British authorities in British Guiana that a contractual relationship existed between the plaintiff and the Government of the United States and that plaintiff's offer to furnish columbite to the Government had been accepted on April 13, 1951.

Prior to August 1, 1951, the EPS sent plaintiff a proposed contract.

On August 1, 1951, plaintiff wrote EPS, stating, in part:

> "(d) Our offer states clearly quote *'Having the assurance and with the help of the United States Government.'* Your instrument neither gives assurance nor offers help."

On or about and between March 13, 1951 and August 3, 1951, the Government well knew, if it did not previously know, that plaintiff was a small company which would "have to have" financial assistance from the Government to enable the plaintiff to perform the contract on the basis of the fixed delivery schedule (f. 13 *).

At a conference between two of the plaintiff's officers and the Commissioner and Purchasing Agent of EPS, held on or about August 3, 1951, Commissioner Walsh of EPS instructed his purchasing agent, Capt. Maull, to prepare a contract which conformed to plaintiff's revised offer (f. 10). Thereafter, the Purchasing Agent of EPS advised plaintiff that the Export-Import Bank and the Economic Cooperation Administration (ECA) had authority to make loans or grant financial assistance to concerns who "had" already contracted to furnish materials for the national stockpile (f. 13). He said:

> "If you sign the contract you will get financial help, if you do not sign the contract, you will not get financial help." (Mins. p. 347)

Plaintiff signed the EPS contract. Contemporaneously, the EPS Purchasing Agent telephoned the Export-Import Bank and was informed that ECA had arranged to send an engineer to British Guiana to examine the plaintiff's lands and that if the Government engineer's report was favorable, the plaintiff would be loaned the moneys needed for the large scale production (Mins. pp. 347-348).

The mechanized equipment needed by the plaintiff for the required production under the EPS contract consisted chiefly of bulldozers for road building and to gather up these surface ores, and concentrating jigs to obtain the columbium-tantalum pentoxides therefrom. The cost of this equipment, as stated above, was part of the plaintiff's

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* f. refers to Findings of Fact in Transcript.

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costs upon which plaintiff additionally allowed itself a 75 cents per pound profit. And the contract was made to provide that the unit prices of the contract, which the Government agreed to pay, were based upon the plaintiff's costs (including such mechanized equipment) and that if said costs increased, the unit prices would be increased by such costs. A clause in the prepared contract giving the Government a right of cancellation in such event, was stricken out and initialed by the parties (f. 10; Pf. Ex. 8, cont. sheet 7).

The EPS contract also provided for deliveries by plaintiff to the Government at port in British Guiana, where title would pass to the Government and risk of loss was on the Government thereafter (Pf. Ex. 8, cont. sheet 4).

An unconditional provisional payment of 75 per cent of the value of each delivery was to be made to plaintiff upon each delivery. To insure such payment, and for plaintiff's use in the meantime, a letter of credit in the amount of $100,000 was required of the Government, in accordance with a contract covenant providing that within 10 days after execution of the contract the plaintiff was required to designate its bank in British Guiana and the Government was required to provide such letter of credit immediately upon notice of designation of the plaintiff's bank, with such letter of credit thereafter to be

> "maintained (by the Government) up to the time the final shipment under the contract is made." (Pf. Ex. 9, cont. sheet 8).

On or about August 28, 1951, the Defense Materials Procurement Agency (DMPA) was formed by executive order and its administration was turned over to Jess Larson, the Administrator of the GSA, of which EPS was an organ, and of which DMPA now became part. The ECA, too, was taken over by the GSA administrator and it ceased to exist.

On January 15, 1952, after a series of conferences with the Director and the Regional Specialist of DMPA and under its direct supervision and guidance, plaintiff, and Kennametal, Inc. as private backers of plaintiff, experienced in mining and taken in by plaintiff with the "elated" approval of DMPA, filed with DMPA a formal detailed application for financial aid by the Government to the plaintiff of $150,000. Repayment to the Government was provided for in columbite at 20 cents per pound of columbite concentrates shipped to and accepted by GSA under plaintiff's EPS contract on the first 400,000 pounds specified therein and thereafter at 15 cents per pound until said loan was fully repaid. Plaintiff and Kennametal at the same time entered into a joint venture agreement as between themselves, conditioned upon the Government granting financial aid to the plaintiff, the procedural channels of which were inquired into and outlined by DMPA to the plaintiff and Kennametal, Inc. at the time of the execution of the financial assistance application and the conditional joint venture agreement (f. 29; Df. Exs. 26, 27).

Shortly thereafter, the report of the ECA engineer, whom the Government had previously sent to investigate plaintiff's lands in British Guiana, was received by the DMPA, who reported to plaintiff and to Kennametal, Inc., by letter dated January 17, 1952, that it was favorable, and met DMPA (stockpile) requirements and those of plaintiff's EPS contract (Pf. Ex. 14). On January 23, 1952, a Government commitment issued, accepting the financial assistance application "in principal" and plaintiff and Kennametal were invited to come to Washington to work out the "details" of a contract (f. 31).

The parties thereafter met and reviewed and amended the boiler plate clauses of an ECA form of contract which the DMPA supplied, to accord with plaintiff's application, and the Government draft was approved by the plaintiff and Kennametal and the Government undertook to prepare it in final form for execution.

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"* * * Kennametal Inc. has advanced the sum of $5,000.00 cash to Willems Industries, Inc. to provide Edward J. Willems with working cash to get his *crews lined up, purchase supplies,* etc. * * * (Italics ours)

"As you can see from the foregoing, we are proceeding on the strength of the assurances made to us in Washington."

Thus wrote Kennametal to DMPA, in part, on February 4, 1952 (Df. Ex. 28).

"It is, of course, encouraging to see progress toward bringing the British Guiana holdings of Willems Industries, Inc., into production. However, it should be pointed out that preparation of the *legal documents* is not the only *impediment* * * *. It is hoped we may soon have a suggested form of document to serve as a *basis for finalization of our agreement in principle.* The execution of a contract is, of course, a prerequisite to the *earmarking of government funds* for the contemplated purposes." (Italics ours)

wrote DMPA to plaintiff and Kennametal on February 15, 1952 (f. 34; Df. Ex. 31).

"Kennametal has now advanced * * * $10,000 to get this project moving",

wrote Kennametal to DMPA on February 18, 1952 (f. 35; Pf. Ex. 12)

"The contract was being 'compared' ". Hire Robert Hippler, of San Jose, as mining geologist "at once",

said DMPA on March 8, 1952, and this was done, at half pay for March and full pay commencing April 1, 1952 (f. 37, Pf. Ex. 25).

On February 5, 1952, plaintiff and Kennametal submitted to DMPA another formal application this one for mine

serialization of the British Guiana project. By letter of DMPA, dated March 12, 1952, such application was approved. The headnote reference of this acceptance recited:

> "* * * Columbite Exploration Program in British Guiana, only."

and the body of the letter recited:

> "The Defense Materials Procurement Agency has approved your application for serialization * * *.
>
> Action on your application has been delayed pending determination of policy on assistance to foreign producers in the development stage only. The several Government agencies have finally agreed to extend limited priorities assistance.
>
> Orders should be certified as stated in Section 14, * * *."

Mine Serial No. MSF-7055-L was awarded to the plaintiff, and it entitled plaintiff "to issue its own priority for necessary maintenance repairs and operations' supplies within the allocations granted by the serialization" (f. 34; Pf. Ex. 26; Df. Ex. 30).

> "Men are getting angry at not being paid, suppliers refuse to deliver goods",

said plaintiff at a show-down conference in Washington on April 15, 1952, when DMPA demanded cancellation of the EPS contract.

> "DMPA thinks Willems pulled a 'fast one' in getting GSA to negotiate the contract. * * * the exploration project will not be approved until Willems cancels the GSA contract."

said the DMPA general counsel (ff. 43, 51).

Prior demands had been made of plaintiff by DMPA for the cancellation of the EPS contract. But the plaintiff

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steadfastly refused to cancel unless the Government replaced it with one "as good or better" (f. 34). On one occasion when plaintiff's refusal included a statement that the contract was made with EPS, the reply of DMPA was:

> "Don't worry about that, we can cancel it, but we want you to cancel it." (Min. p. 378)

At the show-down conference of April 15, 1952, plaintiff refused to cancel the EPS contract, saying it was plaintiff's "life blood". DMPA general counsel then said that if the DMPA contract was not approved "then your GSA contract will fall flat!" The plaintiff disagreed and immediately thereafter proceeded to demand the renewal of the letter of credit required of the Government under the EPS contract, which the Government had permitted to lapse. The Government agreed to renew, then vacillated, stalled and failed to do so; and thereafter it cancelled the EPS contract for plaintiff's alleged failure to make the deliveries provided.

Argument

The Court below dismissed the plaintiff's petition, holding as a matter of law that plaintiff is not entitled to recover.

We believe that the decision below should be reviewed, because it determines novel, unusual and important questions of impediment of performance and anticipatory breach of Government contract, by, between and among agencies under one administrator, charged with obtaining a specific commodity (columbite) for one Government stockpile; novel, unusual and serious departures from fundamental, accepted precepts laid down by this Court for the construction of rights under Government contracts; and the questions presented by this case are or may be of great and recurring significance.

Question 1.

We contend that the Government obligated itself to finance plaintiff's production of the columbite EPS contracted for, on the basis of the fixed delivery schedule the Government accepted.

Involved were surface ores in lands in a foreign country that were heavily forested and without means of ready transportation (Pet. par. 4, adm. by ans.). There were no roads and everything had to be transported by men carrying packs on their backs (f. 6).

The plaintiff was a small company which would "have to have" financial assistance to enable it to perform the contract as accepted (f. 13), and the Government had to pay the costs, plus the contractor's profit of 75 cents per pound. No one forced or urged the Government to contract on the basis of the fixed delivery schedule it sought, or to excise all rights of cancellation as it did. The Korean war was at its height. Commissioner Walsh's direction to his Purchasing Agent "to prepare a contract which conformed to the revised offer" (f. 10), cannot be regarded as doubletalk.

We agree that the acceptance stated nothing "regarding financial aid" (opinion, p. 7). Here we find the Government coming in, however, and accepting an offer of contract of a fixed delivery schedule costed absolutely on an "assurance" of financial "help" necessary to accomplish it, and any increase in cost in any event chargeable to the Government (f. 10). The "elementary principles of law" relied upon below (opinion, p. 7), we believe sustain the construction that the Government went forward on the basis of the fixed delivery schedule in the face of plaintiff's letter of August 1, 1951, stating:

> "(d) Our offer states clearly quote *'Having the assurance and with the help of the United States Government.'* Your instrument neither gives assurance nor offers help"

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and thereby undertook to loan money, or send plaintiff the mechanized equipment needed to get out the ores in the quantities and time the Government required the same. Any other construction under the testimony and findings would have the Government making a contract it knew in advance was impossible of performance (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 298-299).

Question 2.

Whatever the vagueness of an acceptance "in principle", both sides went right ahead on the basis of an existing contractual relationship for Government financial aid in the amount of $150,000. The "details of a contract" too, as prepared by the Government, were thrashed out, and awaited the Government's pleasure (f. 36).

The learned Court below adopted the findings of the learned Commissioner. Yet it completely overlooked his findings of part performance of the DMPA contract. Part performance was by both plaintiff and DMPA, as the Commissioner found (ff. 34, 35, 37, 39, 42). The plaintiff's performance too was at DMPA request (f. 37).

While the learned Court below agrees that Jess Larson, EPS, and Jess Larson, DMPA, were organs of Jess Larson, GSA (opinion, pp. 8, 9), which was to get the columbite under both contracts (Pf. Ex. 8; Df. Ex. 26), it excuses an anticipatory breach resulting from the cancellation demanded by the Government. This would appear to pose a novel question, no less so from a study of the complementary legislation cited (opinion, p. 9) from which it would contrariwise appear that DMPA was directed to aid EPS (Defense Production Act of 1950, 64 Stat. 798, secs. 301, 302, 304, 401, 402, 701, 703; Executive Order No. 10281, 16 F. R. 8789, secs. 303-307, 202, 203).

The only cause expressed by DMPA for the cancellation it demanded and the simple finding of the trial Commis-

sioner was:

> "On several occasions during his negotiations with representatives of plaintiff and Kennametal, Mr. McClintock (Regional Specialist of DMPA) advised them that the EPS contract would have to be cancelled, since the DMPA wanted the columbite material." (f. 34)

This cause was and is wholly foreign to the offer and acceptance "in principle".

The plaintiff could not go back to ECA, which had been taken over by Jess Larson, GSA and DMPA, as well. On the findings of fact (ff. 34, 43, 51) and the opinion of the Court below (pp. 8, 9), it would appear that the DMPA demand was *authorized by the Government* and it was arbitrary.

In this light, the "separate entity" theory of the learned Court below (pp. 9, 10) is novel, unusual and of far reaching future consequence. In view of the "prime importance" placed by the opinion below on its "separate entity" finding (p. 9), common sense poses the following question: Had plaintiff acceded to the cancellation demanded by the Government, could plaintiff be sued by EPS for breach of the EPS contract? Assuredly not! The Government position is untenable (*Helvering* v. *Griffiths*, 318 U. S. 371, 402).

We furthermore question that EPS retained "procurement responsibilities" (opinion, p. 3), and what this means, because there is no evidence that the DMPA program for columbite was separate from that sought for the national stockpile prior to DMPA, but rather that DMPA succeeded EPS (*Exec. Order* No. 10281, 16 F. R. 8789, Secs. 201, ~~501~~; *Exec. Order* No. 10161, 15 F. R. 6105, Secs. 303, ~~304~~).

With due respect to the opinion of the learned Court below, inconsistently the Government took the position be-

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fore the trial Commissioner, as expressed by its counsel, as follows:

> "Mr. Steiner: Your Honor, it is simple. Plaintiff contends that we failed to carry out this agreement. We are showing that prior to the termination that it was Kennametal that separated from them. In other words they were no longer there to get the loan agreement. In other words it wasn't the government, but [they] no longer had the backing that was necessary." (Mins. p. 49)

Petitioner contends that at the time and place of the demanded cancellation, the two agencies were in any case fingers of the same hand, Jess Larson, their administrator; that the legislation was not different in a legal sense, but was in law and fact complementary; that both agencies were in fact required to act toward an identical and reciprocal objective, to wit, the stockpile goal for columbite, and the very creation of DMPA and appointment of Jess Larson as its administrator, effected the establishment of a guaranteeing agency, a financing agency, for the GSA of which EPS was an organ, under one roof, whereby the object of the Congress to grant financial assistance to small business, from whom the government sought to acquire strategic and critical materials, could be coordinated and carried out; that these agencies were required by law to cooperate together for purpose of carrying out the purposes and objects of plaintiff's EPS contract; and that the demand for cancellation was an anticipatory breach of both contracts. Otherwise a Government contract could be cancelled by the Government at will, however it contractually deprived itself of the right to do so, as at bar (Pf. Ex. 8 cont. sheet 7, item 14).

An important question of Government contractual liability is thus involved which has not been, but should be, settled by this court.

Question 3.

The failure of EPS to renew an expired letter of credit it was required to deliver to petitioner's bank in British Guiana immediately upon notice of designation of such bank, and which it was required to "maintain" for the life of the contract was determined by the Court below not to be the breach of a condition precedent, and not to be a breach at all, because it was "only a medium for payment". It was further held that since plaintiff "never developed its lands to achieve commercial production" of columbite in the quantities specified in the contract, the "failure of EPS to renew the letter of credit had no effect whatever on plaintiff's ability to discharge its contract obligations" (opinion, pp. 10-11).

We contend that this holding presents a radical departure from or a novel exception to time honored contract law, by which this Court has determined the Government to be bound (*Hollerbach* v. *United States*, 233 U. S. 165, 171-172; *United States* v. *Bethlehem Steel Corp., supra; United States* v. *Standard Rice Co.*, 323 U. S. 106, 111).

As the learned Court below says, the letter of credit was the "medium" for partial payments (opinion, p. 10). But it is fundamental that payment itself can be a condition precedent. The Government, then, has denied to the plaintiff this medium at a time when it found that plaintiff was going to go it alone (f. 43).

In 7 *Corpus Juris*, p. 594, sec. 237, Letter of Credit is defined:

> "A letter of credit is a letter containing a general or special request to pay the bearer, or person named, money, to sell him some commodity on credit, or to give him something of value, and to look to the writer of the letter for recompense, and partakes of the nature of a negotiable instrument."

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The failure of the buyer to establish a credit by making the proper deposit in a bank as stipulated is a breach before the buyer is entitled to delivery (*Kehlor Flour Mills Co.* v. *Lindon,* 230 Mass. 119, 129, 130; 110 N. E. 608, 701, 702; *Hopkins* v. *La Cato,* 142 Va. 769, 779; 128 S. E. 55, 58).

At bar, the letter of credit was to be "maintained" at $100,000, although the plaintiff might offer delivery of but $5,000 of goods at a time. Its purpose was to secure and insure a "provisional" part payment to plaintiff of 75% for each lot *later* to be offered by plaintiff for delivery, which upon the plaintiff's analysis would meet the contract specifications. To secure to the plaintiff this "provisional" payment upon delivery and passage of title, the letter of credit was "to be established upon notice of designation of the bank by the Contractor" and such credit "shall be maintained ($100,000) up to the time the final shipment under the contract is made" (Pf. Ex. 8, contin, sheet 8, par. 6a). A first performance was independently required of the Government before plaintiff was required to do a thing (except to name its British Guiana bank).

In *Corbin on Contracts,* Vol. 3A, sec. 628, p. 16, conditions precedent are defined as:

> "• • • those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available."

In *Williston on Sales* (Rev. Ed. 1948), Sec. 178, page 458 it is stated:

> "Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed such party may refuse to proceed with the contract or sale."

And in *Corpus Juris Sec.*, Vol. 77, page 754, sec. (b), it is stated that a condition

> "will be construed as a condition precedent if the act stipulated for must be performed before performance can be required from the other party."

Nor did the contract at bar, plaintiff's EPS contract, require the development of plaintiff's "lands on which it held mineral concessions sufficiently to achieve commercial production". To the contrary, the contract provides that "The material to be supplied pursuant to this contract shall have been mined and exported from British Guiana, South America", and no more (Pf. Ex. 8, p. 1).

By the contract terms, plaintiff's delivery could be from plaintiff's lands worked by the plaintiff; it could be from lands worked by the Morabisi Mining Co. (Pf. Ex. 22); or by other prospectors (min. p. 261), like Patterson and Hurley (min. p. 239, 311, 312). Indeed, the plaintiff could be a holding company, a broker, a middle man, or just plain save its lands as long as possible, so long as it made deliveries of columbite which "shall have been mined and exported from British Guiana", against payment that had to be there "upon notice of the designation of the bank" and had to be "maintained up to the time of final shipment".

Analysis shows that the letter of credit was mandatory and the obligation to furnish the same was quite independent of the obligation to deliver goods, and might long antecede, as well as exceed, any quantity of goods initially or from time to time delivered.

Moreover, the Government introduced the plaintiff's demand for the renewal of the expired letter of credit (f. 50), which is quoted in extense, as follows:

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"April 17, 1952

Re: EPO

General Services Administration
Emergency Procurement Service
Washington 25, D. C.

Subject: Contract GS-OOP-870(SCM)
Columbite Concentrates

Att: Mr. H. C. Maull, Jr., Director Purchase Division

Gentlemen:

This will acknowledge your letter, dated April 7 requesting information regarding delivery of Columbite from British Guiana.

During our interview with you at your office yesterday, we discussed our contract and it was agreed that upon written request by us, you would extend our letter of credit to the end of 1952 in the amount of $100,000. Also that you would change the analysis requirements for the purpose of the letter of credit to read 'AVERAGING NOT LESS THAN 55% COMBINED CB,05 PLUS TA,05' and excluding all other chemical specifications.

(The expired letter of credit had deviated from the contract covenant in such respect)

Your Mr. Chaffee pointed out that there are few laboratories in the United States equipped to properly make such analyses and that he knew of only one. It would be impossible to have a complete analysis made in British Guiana. We can, however have the C.B. & T.A. contents certified there.

(Which is all that the contract required.)

Please expedite this letter of credit extension and change as soon as possible, as I intend to leave for British Guiana shortly.

As I related to you yesterday, our camp is now ready at Morabisi and we intend starting to dig and wash

on a small scale to provide you with some poundage by June-July, provided the elements or other acts of God do not prevent us.

May I take this opportunity to thank you for the cordiality extended us by your office.

Very truly yours,

EDWARD J. WILLEMS

EJW/er"

Thus, the letter of credit was not only a condition precedent under the contract, but it would appear that it was subsequently agreed upon as well, and it could be used by plaintiff for any legitimate purpose—to expedite its production; to trade for columbite with other entrepreneurs; to pay subcontractors; to make delivery, and any other appropriate assurance or undertaking it desired to give to its subcontractors, agents, servants or employees, or foreign governments, or suppliers of machinery, wherever purchased, or any other creditor, that $100,000 was there for this admittedly undercapitalized corporate plaintiff. Certain it is that it was the least plaintiff was entitled to have the Government make good upon, and it can hardly be said in the face of the plaintiff's stated intention to make a go of it without further Government assistance that the "failure of EPS to renew the letter of credit had no effect whatever on plaintiff's ability to discharge its contractual obligations" (opinion, p. 11). The Court's finding is unsupported, if this is indeed the test.

It was plaintiff's job to produce goods known to be in abundance. It is immaterial that plaintiff's lands were or were not in "commercial production", although the Government knew the situation when it made the contract, and it is also an unsupported retrospective guess as to what would constitute commercial production. It was defendant's job to promptly deliver the letter of credit and by not doing so it prevented the plaintiff's performance quite effectively, as a matter of law (*Stearns Co.* v.

United States, 291 U. S. 54, 61), and as a matter of fact as the correspondence following April 17, 1952 shows the Government kept plaintiff waiting for the letter of credit that never came (f. 50).

Of course it would also appear that the contracting officer's opinion that "plaintiff contemplated no deliveries" in 1952 (opinion, p. 6) was based upon his own delays and speculation, because the plaintiff said no such thing, and plaintiff's performance should not have been frustrated in this matter (*United States* v. *Peck,* 102 U. S. 64; *Stearns Co.* v. *United States, supra; Stevens* v. *Howard D. Johnson Co.,* 181 Fed. 2d 390, 393; *George A. Fuller Corp.* v. *United States,* 108 Ct. Clms. 70, 95, 96), by the contracting officer whose absence evoked the criticism of the learned trial Commissioner (f. 13).

The plaintiff agrees with the irresistible finding of the learned Court below that in May 1952 "EPS could reasonably have expected to receive delivery of the quantity under contract with the plaintiff" (opinion, p. 15). Thus the Government actually cut the ground from under its contractor's feet (as it did with the DMPA contract), stalling until February 5, 1953 (f. 50 (f)).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RICHARD J. STULL,
Counsel for Petitioner,
11 Park Place,
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ROBERT A. STULL
and
STULL & STULL,
Of Counsel.

APPENDIX

[1]

Opinion by Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS

No. 397-56

(Decided November 1, 1961)

WILLEMS INDUSTRIES, INC. v. THE UNITED STATES

Richard J. Stull for plaintiff. *Stull & Stull* were on the briefs.

John F. Wolf, with whom was *Assistant Attorney General William H. Orrick, Jr.* for defendant.

OPINION

DURFEE, *Judge,* delivered the opinion of the court:

In this action, plaintiff seeks damages in the amount of $1,800,000 for losses alleged to have been sustained in consequence of breach of contract by defendant and defendant counterclaims for $976,000 damages alleged to have resulted from a breach of contract by the plaintiff.

During September 1950, Jess Larson, Administrator of the General Services Administration (GSA) created the Emergency Procurement Service (EPS) within GSA and delegated to it authority he had received from the Muni-

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tions Board to purchase, store, and dispose of critical and strategic materials for the national stockpile pursuant to the Strategic and Critical Materials Stockpiling Act of 1946, 60 Stat. 596, and the Defense Production Act of 1950, 64 Stat. 398.

After ascertaining that columbite ore was in short supply and being purchased for the national stockpile, Edward J. Willems, President of the plaintiff corporation, in a letter dated March 13, 1951, offered to sell to EPS approximately two million pounds of the ore from sources in British Guiana on terms specified therein. On March 29, 1951, a revised offer was submitted in which plaintiff stated that it was unable to furnish a fixed delivery schedule, but

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that shipments would start within six months after the contract was awarded and that as development of the supplies progressed, plaintiff would furnish to EPS quarterly delivery schedules working under a five-year program to deliver a total of about two million pounds of the ore. In addition to such matters as price, specifications regarding the quality of the ore, etc., and a statement to the effect that the primitive conditions at the source of the ore would require considerable effort and expense for development, the revised offer contained the following paragraph:

> Having the assurance and with the help of the United States Government, we are prepared to speed up, and step up, production as rapidly as conditions will permit, by installing whatever feasible equipment may be deemed necessary to achieve the most satisfactory end results.

By telegram dated April 13, 1951, H. C. Maull, Jr., of EPS, responded in language purporting to accept the offer (finding 7). The acceptance differed from the offer in several material respects, and was entirely silent regarding the matter of Government assistance.

On August 1, 1951, Willems wrote to Captain Maull of EPS informing him that the EPS acceptance deviated from the offer in several respects, and in particular, as follows:

> (d) Our offer states clearly quote *"Having the assurance and with the help of the United States Government."* Your instrument neither gives assurance nor offers help.

On August 3, 1951, Willems and a Mr. Wolfson, secretary of plaintiff corporation, conferred with EPS officials in Washington. After plaintiff's representatives had complained of the divergencies between offer and acceptance, the parties entered into a detailed written contract, defining the full scope of their respective obligations and rights in connection with the transaction. The contract stated that the Government procurement was undertaken pursuant to the Strategic and Critical Materials Stockpiling Act of 1946. Prior to the signing of the contract, plaintiff's representatives informed the EPS officials that plaintiff was a small company and would require financial aid from the

[3]

Government to discharge its contractual obligations. The evidence also indicates that Captain Maull informed Messrs. Willems and Wolfson that EPS had no authority under the Strategic and Critical Materials Stockpiling Act of 1946 to make loans to assist EPS contractors, but that certain other government agencies were empowered to do so.

On August 23, 1951, EPS, acting pursuant to a term of the contract, established a letter of credit in the amount of $100,000 with a New York bank, which provided for sight drafts to be drawn by plaintiff as partial payment on the invoiced amounts of shipments of ore meeting specified standards.

From July 1951 on, plaintiff was in communication with the Economic Cooperation Administration (ECA) regarding a loan application for aid in securing equipment neces-

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sary for the development of the area in which the columbite ore was to be mined. Despite communications with several ECA officials, as of September 11, 1951 no loan commitment had been made, although ECA was investigating the project and considering the application. Prior to this time plaintiff had also applied for a loan at the Export-Import Bank.

During that period, by Executive Order No. 10281, 16 F.R. 8789, dated August 28, 1951, the President established the Defense Materials Procurement Agency (DMPA). Executive Order No. 10281 (Finding 21) delegated to DMPA authority to purchase strategic minerals and materials and encourage their development, pursuant to the Defense Production Act of 1950. While EPS was thus relieved of its procurement responsibilities under the Defense Production Act, it retained those deriving from the Strategic and Critical Materials Stockpiling Act of 1946. Jess Larson was named Administrator of DMPA, and certain personnel from other agencies were transferred to DMPA. Among the latter was a Mr. McClintock, who became a regional specialist in the Foreign Expansion Division of DMPA, and who, while at ECA, had communicated with Willems regarding the loan.

After learning of the transfer of McClintock and certain ECA functions to DMPA, on December 11, 1951, Willems mailed an application for a loan of $153,720.00 for explora-

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tion of 12,000 acres of land in British Guiana, to DMPA, for the attention of McClintock. On December 12, 1951, Charles E. Stott, Director of the Foreign Expansion Division, DMPA, replied to Willems' letter advising him, *inter alia*, that the quality of engineering supervision and management to be employed on the project would exert strong influence upon DMPA's consideration of the loan application and requesting further information in that context.

Later in December Willems met with Philip McKenna, President of Kennametal, Inc., a firm with considerable

mining and metals experience which had utilized columbite in its manufacturing operations, and which was interested in acquiring columbite bearing properties. At the meeting discussion concerned the possibility of Kennamental joining with the plaintiff in the columbite venture in British Guiana.

On January 14 and 15, 1952, meetings ensued between representatives of Kennametal and the plaintiff and McClintock and Stott of DMPA concerning the loan application. Terms were discussed, and on January 15, 1952, McClintock suggested that Kennametal and plaintiff submit a new and complete application. McClintock advised the applicants that prior to any action on a contract, it would be necessary to obtain the approval of his division director, and to submit it to the Deputy Administrator, and finally to Jess Larson, the Administrator, for his signature and approval. That afternoon plaintiff and Kennametal drafted a memorandum agreement providing that Kennametal would advance certain monies to plaintiff and join in the venture to develop the columbite sources in British Guiana.

The completed loan application was submitted to McClintock on January 16, 1952. As set out in the application, the loan was to be in the form of an advance against production. In a letter dated January 23, 1952, McClintock advised plaintiff that the application had "been approved in principle" and that arrangements had been made for a conference to work out the details of a contract.

On February 15, 1952, in response to a letter from a Kennametal official, McClintock noted that preparation of legal documents was not the sole impediment to the granting of the loan. As an additional impediment he specified

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the EPS contract, specifically the delivery schedule—deliveries to begin within six months after execution of the August 3, 1951 contract, 400,000 pounds of ore to be delivered by June 30, 1953—and pricing terms to which plaintiff

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d thereby obligated itself. He also noted that although eparation of a draft contract upon which finalization of agreement in principle could be effected was proceed-, execution of a contract was a condition precedent to earmarking of government funds for the project. ere is evidence indicating that during previous meetings, MPA officials had objected to the EPS contract and even manded its cancellation by plaintiff as a condition prece-nt to the granting of a loan, on the grounds that plain-f would be unable to meet the obligations undertaken it in that contract as to price and delivery, and that MPA wished to procure the columbite ore itself. There also evidence indicating that Kennametal officials felt at plaintiff's position under the EPS contract was dis-dvantageous. Nevertheless Willems refused to cancel the PS contract unless the Government replaced it with one least as advantageous.

Another conference occurred in the DMPA offices on arch 7, 1952. McClintock presented a copy of a rough aft of a proposed loan agreement to representatives of aintiff and Kennametal, who raised numerous objections the terms. McClintock informed them that a new DMPA gulation to be released shortly provided a substantially gher schedule of prices than those specified in the EPS ntract for ore of similar qualities. That afternoon Wil-ms and the Kennametal representative conferred with r. Regan, a DMPA attorney, to analyze the proposed con-act. They suggested numerous amendments and deletions Regan, who informed them that he lacked authority to gree to the suggested changes and that the requested dele-ons and amendments might have to be restored when the ntract was executed.

On April 2, 1952, McClintock informed Kennametal that illems was unacceptable to DMPA as head of the project. A final conference ensued between the parties on April 5, 1952. At that time sharp disagreement arose between

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Willems and the DMPA officials, regarding among other matters, the cancellation of plaintiff's EPS contract and Willems' management of the project. The results of the conference were inconclusive.

On April 17, 1952, Kennametal withdrew from negotiations with plaintiff. Upon learning of this, DMPA officials treated the negotiations regarding the loan as terminated. They were never resumed. Thereafter plaintiff was apparently unable to pursue the project to maturity due to lack of capital.

By letters dated January 10 and April 7, 1952, the contracting officer of EPS requested that plaintiff supply statements showing the quantities of ore to be delivered during the first quarter of 1952, as required by the EPS contract.

On April 17, 1952, plaintiff replied by mail requesting extension of the original letter of credit to the end of 1952. On May 21, 1952, plaintiff wrote to EPS, stating that it aspired to attain weekly production of approximately 1,000 pounds of ore by August or September of 1952, and also that it hoped to obtain a Government loan for the purchase of equipment necessary to fulfill the EPS contract.

On May 28, 1952, plaintiff, in a letter, informed EPS that it contemplated shipping 25,000 to 30,000 pounds of ore by the end of 1952, but that this was largely contingent upon plaintiff's ability to obtain the equipment necessary to accelerate production. Plaintiff again requested extension of the letter of credit. On the following day plaintiff, by mail, requested amendment of the contract to extend the original shipment date to the end of 1952.

On June 11, 1952, the contracting officer of EPS replied to plaintiff's correspondence, requesting clarification of the discrepancies apparent in the previous communications regarding the amounts and dates of shipments specified, and the request for extension of the date for the original shipment beyond the end of 1952. The contracting officer also

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requested that plaintiff advise him concerning the necessity for extending the letter of credit through the latter half of 1952, when plaintiff contemplated no deliveries during that period.

On February 5, 1953, EPS advised plaintiff by registered letter that unless deliveries commenced prior to February 15, 1953, plaintiff's right to proceed under the contract

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would be terminated. On February 17, 1953, EPS notified plaintiff that inasmuch as no deliveries had been tendered under the contract, EPS was terminating plaintiff's right to proceed, pursuant to special article 15 (finding 57), without prejudice to any rights the Government might have in consequence of plaintiff's breach of contract.

Plaintiff initially contends that a commitment to advance government loans must be inferred from its negotiations and contract with EPS, and that DMPA, which plaintiff asserts is for these purposes identical with EPS as an organ of GSA, in making the granting of a loan contingent upon cancellation of the EPS contract, effected an anticipatory breach of the EPS contract, excusing plaintiff's performance, and entitling plaintiff to damages.

In asking us to infer from the EPS contract that defendant obligated itself to obtain a government loan for plaintiff, plaintiff stresses the statement in its revised offer of March 29, 1951 to the effect that "having the assurance and with the help of the United States" plaintiff would be able to accelerate production and deliveries. The most elementary principle of contract law requires that an offer, to form the basis of a binding agreement, must be sufficiently definite to enable a court to construe it with precision for purpose of enforcement. 1 Williston, Contracts § 37 (3d ed. 1957). Not only is the statement upon which plaintiff relies indefinite as to the amount of the loan allegedly sought, it is entirely ambiguous as to the type of assistance desired, financial or otherwise. Indeed there is provision in the August 3, 1951 contract, specifying that the Gov-

ernment would assist plaintiff by expediting delivery of machinery for which plaintiff had placed firm purchase orders. Furthermore, defendant's telegraphic acceptance of the March 29, 1951 offer stated nothing whatever regarding financial aid, indicating at least that defendant expressed no intention to contract to secure financial assistance for plaintiff. Moreover, Willems' letter of August 1, 1951 to the EPS officials indicated that plaintiff was aware of defendant's failure to assume any obligation regarding a loan. In view of these circumstances, we must conclude that the evidence in the record concerning the

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period prior to the contract of August 3, 1951 does not support an inference to the effect that defendant had legally obligated itself regarding the financial assistance that plaintiff required to perform its contractual obligations.

The August 3, 1951 contract between EPS and plaintiff is a lengthy, integrated document dealing in detail with every aspect of the mutual obligations of the contracting parties. Consequently, it must be deemed conclusive as to the contractual arrangement extant between the parties, in derogation of any prior commitments the substance of which it embodies. *Holmberg* v. *United States*, 91 Ct. Cl. 501.

Moreover, the evidence indicates that on August 3, 1951, the date the contract was signed, EPS officials informed plaintiff that they were acting pursuant to the Strategic and Critical Materials Stockpiling Act of 1946, which conferred no authority to extend financial assistance. Since neither the offer and acceptance nor the August 3, 1951 contract obligated EPS to secure financial assistance for plaintiff, and since plaintiff was duly apprised of the lack of intention of the EPS officials to incur any such obligation, we must conclude that the procurement of a loan for plaintiff had never been a part of the obligations undertaken by EPS in its contractual arrangement with plain-

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tiff. Consequently, failure by EPS to secure a loan for plaintiff could under no circumstances be deemed a breach of contract.

Plaintiff further asserts that DMPA's refusal to extend a loan to plaintiff unless the EPS contract were canceled, effected an anticipatory breach of the EPS contract in two respects: first, DMPA failed to discharge the Government's obligation under the EPS contract regarding plaintiff's loan; and second, on the theory that a party to a contract is obligated to facilitate, if possible, performance by the other contracting party rather than impede it. Since we have already decided that EPS had never contracted to furnish plaintiff financial assistance, only the second theory requires further consideration.

Plaintiff's argument to the effect that DMPA breached the EPS contract by demanding its cancellation as a condition precedent to the granting of a loan, is necessarily bottomed on the concept that EPS and DMPA, as organs

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of GSA, were for the purposes of the contract and this proceeding identical. Only on this assumption can plaintiff construct an argument to the effect that DMPA's actions constituted impediment of performance under the contract by a contracting party.

The EPS contract states on its face that EPS was acting in a procurement capacity under authority of the Strategic and Critical Materials Stockpiling Act of 1946. DMPA was endowed with procurement authority deriving from the Defense Production Act of 1950 in addition to its delegated lending authority pursuant to Executive Order No. 10281. DMPA was empowered generally to lend money to encourage development of sources of strategic materials pursuant to the Defense Production Act. The exercise of DMPA's delegated authority was entirely independent of EPS action and control, originating as it did in separate, independent legislation. Implicit in the delegation to DMPA of authority to make loans from a fund of money is the

discretion to select as projects for investment those promising the most fruitful use of the available funds while insuring greatest protection of the capital invested. Consequently, it would seem perfectly reasonable for DMPA officials to refuse to lend money for plaintiff's venture if they believed that the obligations which plaintiff had undertaken in the EPS contract were sufficiently disadvantageous to make fruition of the development project doubtful, thus jeopardizing the integrity of the funds loaned. In this context, we think it significant that plaintiff sought terms whereby repayment of the proposed loan would be required exclusively in the form of deliveries of ore, and that plaintiff and its co-venturer refused terms whereby they would have been bound to repay the loan in the event that exploration proved commercial development of the sources unfeasible and no deliveries were made. On the other hand, DMPA might well have demanded cancellation of the EPS contract as a condition precedent to the granting of the loan to the end that it might contract with plaintiff to purchase the ore pursuant to its own procurement program, thereby placing control over the loan and procurement under the aegis of the same agency. The factor of prime importance is that EPS and DMPA were in fact separate

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entities, albeit both were within GSA, acting pursuant to different legislation towards objectives that were not necessarily either identical or reciprocal. EPS, under the Strategic and Critical Materials Stockpiling Act of 1946, was functioning solely in a procurement capacity when it contracted with plaintiff, and thus presumably would best serve the legislative purpose by purchasing the ore at the lowest price attainable under market conditions. DMPA, on the other hand, was concerned, pursuant to its statutory authority, with a broader program of encouraging development of strategic materials in short supply, as well as with procurement. As a lender, DMPA was genuinely interested in the security of funds invested in plaintiff's project and

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consequently directly concerned with the possibility of the project failing due to the inability of plaintiff to perform under a disadvantageous contract with EPS. Moreover, DMPA, by virtue of its authority to encourage development of strategic materials in short supply might ultimately have paid higher prices for the ore than those specified in the EPS contract. On the basis of the record and the circumstances noted above, we conclude that the two agencies were not identical for the purposes of the transaction, and that DMPA's actions did not constitute the actions of a party to the EPS contract. Consequently, we find that the DMPA demand for cancellation of the EPS contract as a condition precedent to the granting of the loan did not precipitate an anticipatory breach of the EPS contract by the Government. As noted earlier, DMPA was under no compulsion to advance the loan, and plaintiff was in no way proscribed from seeking the funds it required elsewhere.

Regarding the EPS contract, plaintiff alleges additionally that EPS committed a breach by failure to renew the letter of credit for the benefit of the plaintiff. We see no merit in this contention since the contract obligated EPS to maintain the letter of credit only as a medium for partial payment to plaintiff for shipments of ore actually made pursuant to the contract. Maintenance of the letter of credit was not a condition precedent to plaintiff's performance. Inasmuch as plaintiff never developed the lands on which it held mineral concessions sufficiently to achieve commercial production and thus never approached the position where it could deliver quantities as specified in the contract, failure of EPS to renew the letter of credit had

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no effect whatever on plaintiff's ability to discharge its contractual obligations. On the contrary, the evidence supports the finding that at all times until February 15, 1953 EPS was ready and willing to discharge its obligations, but that plaintiff was patently unable to perform under the contract. Cancellation by EPS was entirely justified

under the clause of the contract that accorded EPS the absolute right to terminate, notwithstanding any other term embodied therein, if by February 15, 1953 plaintiff had made no deliveries. While it is true that plaintiff supplied some samples of the ore for the Government's analysis, the record discloses no shipments by plaintiff that in quantity or under any other criteria might, even under the most generous construction, be deemed deliveries pursuant to the contract.

Plaintiff attempts to rely on the *force majeure* clause of the contract, which would extend the dates for performance in the event of delays due to the occurrence of certain contingencies beyond plaintiff's control. Plaintiff cites as the contingency invoking the *force majeure* clause the failure of DMPA to lend plaintiff the funds it required to perform its part of the contract. The cause of plaintiff's inability to perform, rather than deriving from a contingency beyond plaintiff's control, lay solely in the conspicuous undercapitalization of the corporation with relation to the obligations it undertook under the EPS contract. As noted above, neither EPS nor DMPA was at any time obligated to advance funds to plaintiff, and plaintiff was not restricted to these agencies, or to the government, in its quest for the funds it required. Plainly, plaintiff's undercapitalization is not such a circumstance beyond its control as to be within the purview of any *force majeure* clause.

Plaintiff asserts further that it suffered damages in consequence of a breach of contract to make a loan on the part of DMPA. It is plaintiff's position that by McClintock's letter of January 23, 1952, DMPA contracted to issue the loan. The letter reads as follows:

> Referring to your application in conjunction with Kennametal, Inc., for an advance against production pursuant to recommended development program in British Guiana has been approved in principle.

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Arrangements have been made for a conference next Monday to work out the details of a contract.

Plaintiff contends that the words "approved in principle" in the letter effected an acceptance in fact of the loan application, thereby establishing a contract under which DMPA obligated itself to advance funds to plaintiff.

We must ascertain whether McClintock's letter was sufficiently positive and unequivocal, so as to indicate intention to assent to the offer, and to create a contract. 1 Williston, Contracts § 72 (3d ed. 1957). We think it was not. While the words "approved in principle" bear the connotation of a vague sort of assent to the general idea of a plan or project, we believe they do not indicate unequivocal acceptance of a specific offer with intent to effect a contractual relation, even as the use of the word "approved" exclusively might be susceptible of such construction. The second sentence of the letter, proposing a date for a conference at which the details of the "contract" might be worked out, complements and confirms this construction. The expressed need to "work out the details of a contract" connotes clearly the fact that negotiations had not yet been concluded, and that the letter itself could not be construed as creating the contract. That McClintock did not intend the phrase "approved in principle" to create a contract is borne out by the facts attending the negotiations. DMPA procedure required that the regional specialist (McClintock) would review a proposed project with the loan applicants. If he deemed it meritorious and within a DMPA program, he would reach a tentative agreement with the applicants regarding the extent of the project and the manner of effectuation. This was termed as a phrase of art, an "agreement in principle." The regional specialist would then prepare a summary of the project for the Director of the Foreign Expansion Division, with a recommendation that negotiations toward a

possible contract be continued. If approved by the Division Director, the specialist and the DMPA legal staff would attempt to work out the detailed contract with the applicant. When the parties agreed on the terms of a proposed contract, a draft thereof would be submitted to the Division Director for his approval, after which it would be sent to the Administrator for his signature (finding 32).

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Although plantiff might not have been fully apprised of this procedure, on January 15, 1952, only eight days prior to the date on his letter, McClintock informed the applicants that prior to the granting of any loan, a contract would have to be prepared which would meet the approval of the Division Director and be signed by the Administrator. Since plaintiff was to this extent aware of the procedure, and in view of McClintock's allusion to the projected conference to "work out the details of a contract," we conclude that plaintiff had no reasonable basis for construing McClintock's letter of January 23d as an acceptance of its loan application establishing a binding contract between the parties.

Having concluded that defendant was not guilty of any breach of contract, let us now consider defendant's counterclaim for damages based on plaintiff's nonperformance under the EPS contract. The single reason for plaintiff's failure to perform its obligations under that contract was its obvious undercapitalization. As noted earlier, plaintiff was aware of its lack of sufficient funds to perform when it committed itself under the EPS contract but proceeded regardless, on the assumption that it would be able to raise the capital, probably from the government. When the needed funds failed to materialize, due to no legal malfeasance by the Government, plaintiff could not develop its properties and thus could not make any deliveries under the contract. Plaintiff's failure to perform, on the basis of the record, undoubtedly constituted a breach of contract. The Government was within its rights in terminating plain-

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tiff's right to perform by invoking the article of the contract providing precisely for such action in the event of plaintiff's failure to make any deliveries prior to February 15, 1953, and which preserved whatever other rights might accrue to the Government in consequence of plaintiff's failure under the contract. Under the basic principles of contract law, plaintiff is liable to defendant for damages in an amount equal to the losses incurred as the natural and proximate consequence of plaintiff's breach of contract.

In the present case defendant concedes that EPS did not replace the ore undelivered under the EPS contract, but argues that the Government suffered damages directly attributable to plaintiff's breach in the amount of $976,000.

[14]

While EPS did not replace the undelivered 2,400,000 pounds of ore, on May 28, 1952 DMPA was authorized by an administrative order to procure fifteen million pounds of columbite ore by the end of 1956, at prices designated therein (finding 58) pursuant to which the Government calculates it would have had to pay $976,000 more for 2,400,000 pounds of ore of the quality to be delivered under the EPS contract than it would have paid had plaintiff discharged its obligations (finding 62). In view of the relatively short supply of columbite at the time, defendant argues vigorously that by virtue of the fact that the Government held itself out as ready to purchase fifteen million pounds of the ore at the higher prices, those prices became the market prices, and thus, since in the case of a breached sales contract the measure of damages is usually the difference between the market and contract prices, its loss should be placed at $976,000. At the end of 1956, DMPA had purchased the full fifteen million pounds authorized by the directive, at the higher prices set forth therein. Defendant contends that it is highly probable that had plaintiff delivered the 2,400,000 pounds of ore specified in the EPS contract, the fifteen million pounds authorized by the DMPA directive would probably have been reduced by

an identical quantity. Defendant does not, however, offer any concrete support for this assumption.

Although defendant informs us in its brief that the "weight of authority" has "well established" the proposition that a buyer aggrieved by a seller's breach of a sales contract need not repurchase the undelivered goods to recover damages measured by the difference between the market and contract prices, the sole supporting authority cited is *United States* v. *U.S. Foreign Corporation,* 151 F. Supp. 658 (S.D. N.Y.), wherein a moderated statement of the proposition appears as the unsupported *obiter dictum* of the district judge.

In the classic case of a vendor's breach of a contract for the sale of goods, the vendee is often said to be entitled to damages equal to the difference between the contract price and the market price. In these cases, however, the proposition attains utility only because the aggrieved vendee has proven that it actually suffered losses in that amount as a

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natural and proximate result of the vendor's breach. Often this is established by proving that the vendee went out on the open market following the vendor's breach and replaced or sought to replace the undelivered goods. General propositions concerning the measure of damages are relevant to the particular controversy, however, only insofar as they reasonably represent the nature of the loss that the claimant can prove actually and proximately resulted from the vendor's nonperformance. Stated another way, the measure of damages to be applied in the particular case is irrelevant until the claimant has established the fact of losses that were the natural and proximate result of the breach of contract. Were this not true, the doctrine of mitigation of damages would lose much of its significance. The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere specu-

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lation. *Winn-Senter Construction Co.* v. *United States,* 110 Ct. Cl. 34, 63.

In view of the circumstances attending this controversy, we do not believe that the Government has adequately discharged either of its burdens. Under the breached contract EPS was the signatory party. The Government has not attempted to show that EPS made efforts to replace the ore plaintiff failed to deliver, or even that it suffered loss in any way as a result of plaintiff's breach. As a matter of fact, the sole support of the claim of loss set forth in the Government's brief is the unsupported proposition that "it is reasonable to conclude that if delivery had been made under the EPS contract the requirements under the Defense Production Act of 1950 and Executive Order No. 10281 could have been reduced to the extent that plaintiff had performed under the EPS contract." No rationale is offered to provide any clue as to why this should be. In point of fact, EPS and DMPA undertook procurement pursuant to different delegations of statutory authority. The DMPA directive for the procurement of fifteen million pounds of columbite ore was issued in May 1952, at a time when EPS could reasonably have expected to receive delivery of the quantity under contract with plaintiff. Inasmuch as the DMPA directive, issued pursuant to the

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Defense Production Act of 1950, called for procurement of fifteen million pounds without reference to the quantity EPS had previously placed under contract pursuant to the Strategic and Critical Materials Stockpiling Act of 1946, it seems at least as reasonable to conclude that the DMPA purchases were to be in addition to those of EPS, and that had plaintiff delivered the ore under contract DMPA would have persisted in procuring the entire amount authorized, as it does to accept the Government's assumption. The order authorizing DMPA's procurement of the additional fifteen million pounds of columbite ore indicates on its face that it was designed to encourage expansion of production of the ore (finding 58), as distinguished from normal pro-

curement on the open market, and bears the indisputable connotation that the higher prices specified therein were offered as an incentive to this end. In this context we find enlightening the testimony below to the effect that upon conclusion of the DMPA program the price of columbite ore fell drastically to levels below those specified in the EPS contract. The fact that DMPA did ultimately purchase the fifteen million pounds at the higher prices specified in the order has no proven relation to plaintiff's breach of contract. Consequently, in view of defendant's utter failure to establish any loss suffered by the Government as a result of plaintiff's breach, we conclude that defendant has failed to discharge its burden of proving the fact of loss thus precluding recovery on its counterclaim.

For the reasons stated we hold that neither party is entitled to any recovery as a result of this proceeding. Therefore plaintiff's petition and defendant's counterclaim will be dismissed.

It is so ordered.

MADDEN, *Judge* (*Ret.*); LARAMORE, *Judge*; WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

Appendix

Defense Production Act of 1950 (64 Stat. 798):

SEC. 301. (a) In order to expedite production and deliveries or services under Government contracts, the President may authorize, subject to such regulations as he may prescribe, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Department of Commerce, and such other agencies of the United States engaged in procurement for the national defense as he may designate (hereinafter referred to as "guaranteeing agencies"), without regard to provisions of law relating to the making, performance, amendment, or modification of contracts, to guarantee in whole or in part any public or private financing institution (including any Federal Reserve bank), by commitment to purchase, agreement to share losses, or otherwise, against loss of principal or interest on any loan, discount, or advance, or on any commitment in connection therewith, which may be made by such financing institution for the purpose of financing any contractor, subcontractor, or other person in connection with the performance, or in connection with or in contemplation of the termination, of any contract or other operation deemed by the guaranteeing agency to be necessary to expedite production and deliveries or services under Government contracts for the procurement of materials or the performance of services for the national defense.

(b) Any Federal agency or any Federal Reserve bank, when designated by the President, is hereby authorized to act, on behalf of any guaranteeing agency, as fiscal agent of the United States in the making of such contracts of guarantee and in otherwise carrying out the purposes of this section. All such funds as may be necessary to enable any such fiscal agent to carry out any guarantee made by it on behalf of any guaranteeing agency shall be supplied and disbursed by or under authority from such

guaranteeing agency. No such fiscal agent shall have any responsibility or accountability except as agent in taking any action pursuant to or under authority of the provisions of this section. Each such fiscal agent shall be reimbursed by each guaranteeing agency for all expenses and losses incurred by such fiscal agent in acting as agent on behalf of such guaranteeing agency, including among such expenses, notwithstanding any other provision of law, attorneys' fees and expenses of litigation.

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SEC. 302. To expedite production and deliveries or services to aid in carrying out Government contracts for the procurement of materials or the performance of services for the national defense, the President may make provision for loans (including participations in, or guarantees of, loans) to private business enterprises (including research corporations not organized for profit) for the expansion of capacity, the development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals. Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary, except that financial assistance may be extended only to the extent that it is not otherwise available on reasonable terms.

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SEC. 304. (a) For the purposes of sections 302 and 303, the President is hereby authorized to utilize such existing departments, agencies, officials, or corporations of the Government as he may deem appropriate, or to create new agencies (other than corporations).

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SEC. 401. It is the intent of Congress to provide authority necessary to achieve the following purposes in

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order to promote the national defense: * * *, and the maintenance and furtherance of the American way of life. Whenever the authority granted by this title is exercised, all agencies of the Government dealing with the subject matter of this title, within the limits of their authority and jurisdiction, shall cooperate in carrying out these purposes.

* * *

Sec. 701. (a) It is the sense of the Congress that small-business enterprises be encouraged to make the greatest possible contribution toward achieving the objectives of this Act.

(b) In order to carry out this policy—

(i) the President shall provide small-business enterprises with full information concerning the provisions of this Act relating to, or of benefit to, such enterprises and concerning the activities of the various departments and agencies under this Act;

* * *

(iii) in administering this Act, such exemptions shall be provided for small-business enterprises as may be feasible without impeding the accomplishment of the objectives of this Act; and

(iv) in administering this Act, special provision shall be made for the expeditious handling of all requests, applications, or appeals from small-business enterprises.

(c) Whenever the President invokes the powers given him in this Act to allocate, or approve agreements allocating, any material, to an extent which the President finds will result in a significant dislocation of the normal distribution in the civilian market, he shall do so in such a manner as to make available, so far as practicable, for busi-

ness and various segments thereof in the normal channel of distribution of such material, a fair share of the available civilian supply based, so far as practicable, on the share received by such business under normal conditions during a representative period preceding June 24, 1950 and having due regard to the needs of new businesses.

SEC. 702. As used in this Act—

(a) The word "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided,* That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or government agency.

* * *

SEC. 703. (a) Except as otherwise specifically provided, the President may delegate any power or authority conferred upon him by this Act to any officer or agency of the Government, including any new agency or agencies (and the President is hereby authorized to create such new agencies, other than corporate agencies, as he deems necessary), and he may authorize such redelegations by that officer or agency as the President may deem appropriate. The President is authorized to appoint heads and assistant heads of any such new agencies, and other officials therein of comparable status, * * *.

SEC. 704. The President may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this Act. Any regulation or order under this Act may be established in such form and manner, may contain such classifications and differentia-

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tions, and may provide for such adjustments and reasonable exceptions as in the judgment of the President are necessary or proper to effectuate the purposes of this Act, or to prevent circumvention or evasion, or to facilitate enforcement of this Act, or any rule, regulation, or order issued under this Act.

Strategic and Critical Materials Stockpiling Act (50 U.S.C. 98):

SEC. 4. The Secretary of War and the Secretary of the Navy shall submit to the Congress, not later than six months after the approval of this Act, and every six months thereafter a written report detailing the activities with respect to stock piling under this Act, including a statement of foreign and domestic purchases, and such other pertinent information on the administration of the Act as will enable the Congress to evaluate its administration and the need for amendments and related legislation.

Executive Order No. 10161 (15 F. R. 6105):

SEC. 303. (b) The Administrator of General Services is hereby authorized and directed to purchase and make commitments to purchase metals, minerals, and other raw materials, including liquid fuels, for Government use or resale, as authorized by and subject to section 303 of said Act: *Provided,* That the Secretary of Agriculture is also authorized to exercise the functions under section 303 with respect to agricultural commodities.

(Note: Revoked by sec. 201 of Exec. Order No. 10281.)

Appendix

Executive Order No. 10281 (16 F. R. 8789):

SECTION 101. (a) There is hereby created an agency which shall be known as the Defense Materials Procurement Agency. There shall be at the head of the said agency a Defense Materials Procurement Administrator, who shall perform his duties subject to direction, control, and coordination by the Director of Defense Mobilization.

(b) The Defense Materials Procurement Administrator shall be appointed by the President by and with the advice and consent of the Senate. There may be appointed to the office of Defense Materials Procurement Administrator any officer of the Executive branch of the Government designated by the President, to hold the office of Defense Materials Procurement Administrator in addition to his other office. *Provided,* That the office of Administrator shall have no compensation attached to it so long as it is held by any other officer of the Government.

PART II. FUNCTION OF THE DEFENSE MATERIALS PROCUREMENT ADMINISTRATOR

SEC. 201. Sections 303 and 304 of Executive Order No. 10161 of September 9, 1950 (15 F. R. 6105-6106), as amended, are hereby revoked, and there are hereby inserted in lieu thereof the following new sections:

"SEC. 303. The Defense Materials Procurement Administrator is hereby authorized and directed to purchase and make commitments to purchase metals, minerals, and other materials, for Government use or resale, as authorized by and subject to the provisions of section 303 of the Defense Production Act of 1950, as amended: *Provided,* That the Secretary of Agriculture is also authorized to exercise the said functions under section 303 of the said Act, as amended, with respect to food.

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SEC. 304. The Defense Materials Procurement Administrator is hereby authorized and directed to encourage the exploration, development, and mining of critical and strategic minerals and metals, as authorized by and subject to the provisions of section 303 of the Defense Production Act of 1950, as amended.

SEC. 305. The Defense Materials Procurement Administrator is hereby authorized and directed to make subsidy payments, to determine the amounts, manner, terms, and conditions thereof, and to make findings, as authorized by and subject to the provisions of section 303 (c) of the Defense Production Act of 1950, as amended.

* * *

SEC. 307. The functions conferred upon the Defense Materials Procurement Administrator by sections 303 to 306, inclusive, of this Executive order, shall be carried out in accordance with programs certified to the said Administrator by the Defense Production Administrator: *Provided*, That any exercise by the Defense Materials Procurement Administrator of the functions provided for in section 303 hereof with respect to food shall be carried out in accordance with programs certified to him by the Secretary of Agriculture.

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SEC. 202. The Defense Materials Procurement Agency is hereby designated as an additional guaranteeing agency under section 301 of the Defense Production Act of 1950, as amended; and, accordingly, section 301 of Executive Order No. 10161 of September 9, 1950, as amended, is hereby amended by inserting therein, after the words "the Department of Agriculture", the words "the Defense Materials Procurement Agency,".

SEC. 203. The provisions of Part I of Executive Order No. 10210 of February 2, 1951 (16 F. R. 1049), entitled "Authorizing the Department of Defense and the Department of Commerce To Exercise the Functions and Powers Set forth in Title II of the First War Powers Act, 1941, as Amended by the Act of January 12, 1951, and Prescribing Regulations for the Exercise of Such Functions and Powers", are hereby extended to the Defense Materials Procurement Agency;

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